(1)

No. 90-82

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

VIDEO NEWS, INC.,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTICT OF TEXAS

PETITION FOR WRIT IN A CRIMINAL CASE

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QUESTION PRESENTED

Did the Texas Court of Appeals violate due process or equal protection of the law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, when a right of appeal is effectively denied by a state appellate court incorrectly applying the legal doctrine of *stare decisis*?

STATEMENT OF CORPORATE AFFILIATION

Video News, Inc is a corporation duly formed under the laws of the State of Texas. Video New, Inc. is not a subsidiary, parent of any corporate entity or affiliated with any other corporate entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

STATUTES:

OTHER:

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OPINIONS BELOW

The decision of the Texas Court of Criminal Appeals denying discretionary review in this matter was entered February 28, 1990, and is reported as *Video News, Inc.* v. *State*, 786 S.W.2d 356 (Tex.Crim.App. 1990). (Copy attached; appendix p.5a.) A timely motion for rehearing was denied April 11, 1990. (Copy attached; appendix p.6a.) The decision of the Court of Appeals for the First District is reported as *Video News, Inc.* v. *State*, 781 S.W.2d 411 (Texas Ct.App. 1989). (Copy attached; appendix p.1a.) The sentences of the trial court, the County Criminal Court of Law No. 6, Harris Coun-

ty, Texas, were entered on May 1, 1989, when Petitioner entered a plea of *nolo contendere* to the eleven (11) separate cases brought by the State of Texas.

JURISDICTIONAL STATEMENT

The judgment of the Texas Court of Criminal Appeals denying discretionary review was entered February 28, 1990, and the motion for rehearing was denied by entry dated April 11, 1990. The writ of certiorari is requested pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, Section 1, United States Constitution, which provides:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Texas Penal Code, Section 43.21, provides:

§ 43.21. Definitions

(a) In this subchapter:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or described:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious, literary, artistic, political, and scientific value.

(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

(7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(b) If any of the depictions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

4. The Texas Penal Code, Section 43.23, provides:

§ 43.23. Obscenity

(a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.

(b) An offense under Subsection (a) of this section is a felony of the third degree.

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) An offense under Subsection (c) of this section is a Class A misdemeanor.

(e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) This section does not apply to a person who possesses or distributes obscene material or obscene devices or participates in conduct otherwise proscibed by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

STATEMENT OF THE CASE

On May 1, 1989, in the Criminal Court No. 6 of Harris County, Texas, before the Honorable J. R. Musselwhite, Petitioner Video News, Inc. pled *nolo contendere* in eleven (11) separate cases and was found guilty of possession of obscene material in violation of Texas Penal Code Section 43.23 in each case. The court found Petitioner guilty and imposed a fine of one thousand dollars ($1,000.00) in each case. A timely appeal was perfected to the Court of Appeals for the First Supreme Judicial District of Texas at Houston, which consolidated the cases for purposes of briefing, consideration and decision. The Court of Appeals affirmed all of Petitioner's convictions in an opinion filed November 16, 1989. No rehearing before the Court of Appeals was sought.

Prior to entering a plea of *nolo contendere*, Petitioner Video News, Inc. on May 1, 1989, argued a joint motion to quash the informations, specifically contending that sections 43.21 *et seq.* of the Texas Penal Code are unconstitutional under the Texas Constitution, even assuming that those statutes might be constitutional under the United States Constitution. The consolidated appeal to the Court of Appeals turned on the sole issue of whether the Texas obscenity was constitutional under the Texas Constitution.

The Court of Appeals relied upon the case of *Malone* v. *State*, 339 S.W.2d 666 (Tex.Crim.App.1960) and summarily dismissed Petitioner's claims that the Texas obscenity law is overbroad under the Texas Constitution. *Malone* is a plurality opinion, where each member of the three-judge panel wrote a separate opinion.

A timely petition for discretionary review was filed with the Court of Criminal Appeals (the court of last resort for all criminal cases in the State of Texas). This petition was denied but the Court expressly declined to adopt the reasoning of the Court of Appeals. A motion for rehearing was likewise denied by the Court.

In both the petition for discretionary review and the motion for rehearing, Petitioner argued that the Court of Appeals misconstrued and misapplied the holding of *Malone* and violated the legal doctrine of *stare decisis*. In this case, the violation of this well-established principle of law amounts to a deprivation of due process of law and of equal protection of the law. *See e.g.* Motion for Rehearing, appendix p. 9a.

REASON FOR GRANTING THE WRIT

WHEN A STATE APPELLATE COURT DECIDES A CONVICTED CRIMINAL DEFENDANT'S APPEAL IN VIOLATION OF PRINCIPLES OF *STARE DECISIS* THERE IS A DEPRIVATION OF THE DEFENDANT'S CONSTITUTIONALLY GUARANTEED RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

It is well-established that the individual states are not required to grant any criminal appeal by the United States Constitution. *McKane* v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1894). However, it is equally well-established, that if a state has created a system of appellate courts, the procedure used in determining criminal appeals must comport with the demands of both the due process and equal protection clauses of the United States Constitution. *Evitts* v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). When the Texas appellate court relied upon *Malone* v. *State*, 339 S.W.2d 666 (Tex.Crim.App.1960), to summarily dismiss Petitioner's claims, the Court violated long-standing principles of law dating back to the early days of both American and English jurisprudence. While a state is "entitled to determine the procedure of its courts. . ." it still must provide "the requisite due process" mandated by the federal constitution. *United Gas Public Service Co.* v. *Texas*, 303 U.S. 123, 140, 58 S.Ct. 483, 492 (1938).

In this case, the Texas Court of Appeals dismissed Petitioner's arguments that the Texas obscenity law, section 43.21 *et seq.* of Texas Penal Code, is overbroad under the Texas Constitution, relying solely on *Malone*. In effect, the Court refused to address Petitioner's arguments, and misapplied *Malone* because that case cannot be read to stand for the proposition for which it was cited by the Court. *Malone* clearly is not authority for the proposition that the current Texas obscenity law is constitutional under the Constitution of the State of Texas. In fact, *Malone* supports the proposition that the current Texas obscenity law is *unconstitutional* under the Texas Constitution.

Due process of law mandates that criminal defendants be provided "an adequate opportunity to present their claims fairly within the adversary system." *Ake* v. *Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1094 (1985), citing *Ross* v. *Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444 (1974). Additionally, the Fifth and the Fourteenth Amendment's due process guarantee of fundamental fairness mandates that a state provide a criminal defendant "the opportunity to participate *meaningfully* in a judicial proceeding in which his liberty is at stake." *Ake* v. *Oklahoma*, 470 U.S. at 76, 105 S.Ct. at 1093 (emphasis added). This Court has also recognized that access to the trial record is one consideration "which makes any appellate review *meaningful*. . . ." *Gardner* v. *California*, 393 U.S. 367, 368, 89 S.Ct. 580, 581 (1969) (emphasis added). Here, there was never any meaningful review of the contentions of Petitioner because of the misapplication of the legal principle of *stare decisis* by basing its decision in this case on *Malone* when that case does not resolve any of the contentions that were raised by Petitioner in the Texas courts.

The *Malone* case was decided by a divided panel of the Texas Court of Criminal Appeals. The court reversed the conviction and remanded the matter to the trial court. A majority of the panel concluded that the conviction could not stand without reaching a consensus on the grounds for the reversal. Presiding Judge Morrison opined that the conviction was invalid because proper instructions requested by the defendant had been improperly denied. *Malone*, 339 S.W.2d at 668. In *obiter dictum*, Judge Morrison stated that a statute which embodied the definition of obscenity as contained in *Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957), comported with the Texas Constitution.

Judge Davidson in a separate opinion specifically "concur[ed] in the reversal of this conviction" because he believed there was insufficient evidence to support the conviction. *Malone*, at 668-69. Judge Davidson went on to state that the "*statute under which this prosecution is brought is unconstitutional* and invalid for the reason that it is so in-

definitely framed and of such doubtful construction that it cannot be understood from the language in which it is expressed and is therefore insufficient as a penal statute." *Id.* at 669 (emphasis added).

Judge Woodley, who dissented, asserted that any error was harmless and would have affirmed the conviction. *Id.* In his dissent, Judge Woodley did not discuss the constitutionality of the statute.

Subsequent to the decision in *Malone*, this Court "formulate[d] standards [to determine obscenity] more concrete than those in the past." *Miller* v. *California*, 413 U.S. 15, 20 93 S.Ct. 2607, 2612 (1973). These new guidelines differed from those set forth in *Roth* in several important respects. First, the Court specifically formulated a second prong for the definition: "whether the work depicts or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Id.*

Second, and most importantly, the *Miller* Court rejected the third prong of the *Roth* definition that required the work to be "utterly without redeeming social value. . ." and substituted that prong with a test that "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at 24, 93 S.Ct. at 2615. *Malone*, decided in 1960, did not and could not have addressed the constitutionality of the current Texas obscenity law which, as will be demonstrated, is clearly based on the *Miller* definition of obscenity formulated in 1973. Of particular importance is the replacement of the third-prong's test that the work be "utterly without redeeming social" with the less restrictive test that "the work taken as a whole, lacks serious literary artistic, political or scientific value."

Judge Morrison in his opinion in *Malone* specifically stated that it was the definition formulated in "*Roth* v. *U.S.* . . ." that was consistent with the Texas Constitution. *Malone*, 339 S.W.2d at 667. Recognizing the cruicial distinction between *Roth* and *Miller*, *Malone* can, at best, be properly cited for

the proposition that only the *Roth* definition of obscenity comports with the Texas Constitution; it cannot be applied to support the proposition that the *Miller* definition of obscenity comports with the Texas Constitution because of the change that *Miller* created in the third prong of the *Roth* obscenity definition.

The *Roth* Court specifically held that:

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the [constitutional] guarantees, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Roth*, 354 U.S. at 484, 77 S.Ct. at 1309 (emphasis added).

Miller changed the third prong of the test radically; the "utterly without redeeming social value" test was replaced by whether the work, taken as a whole, "lacks serious literary, artistic, political, or scientific value." *Miller* at 24, 93 S.Ct. at 2615. Therefore, even assuming that *Malone* may be read for the proposition that the *Roth* formulation of obscenity is constitutional under the Texas Constitution, it cannot be construed as authority that the *Miller* definition is similarly constitutional.

The statute under which petitioner was charged, Tex. Penal Code Ann. sec. 43.23 (Vernon 1989), is based on the *Miller* definition of obscenity and tracks the language of *Miller*, which includes that the work "taken as a whole, lacks serious literary, artistic, political, and scientific value." Texas Penal Code, Section 43.21 (C). This Court has recognized that "*Miller* did not simply clarify *Roth; it marked a significant departure* . . . . And *there can be little doubt that the third test* announced in *Miller* . . . *expanded criminal liability.*" *Marks* v. *United States*, 430 U.S. 188, 194, 97 S.Ct. 990

(1977) (emphasis added). "Clearly, it was thought that some conduct which would have [formerly] gone unpunished [under the *Roth* definition] . . . would result in conviction under *Miller*." *Id.*

Thus, *Malone* cannot be read for the proposition that the current Texas obscenity law does not violate the Texas Constitution. If *Malone* definition is assumed to be the proper definition of obscenity under the Texas Constitution, then Petitioner was entitled to a reversal in this case because the current Texas obscenity statute based on the *Miller* definition is overbroad and unconstitutional under the Texas Constitution as *Miller* expanded criminal liability significantly beyond the boundaries set by *Roth*.

Nearly a century ago this Court stated that whether a particular mode of criminal procedure followed by a state yields due process of law depends upon "whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases." *Lowe* v. *Kansas*, 163 U.S. 81, 85, 16 S.Ct. 1031 (1896) (citations omitted). Any state's enforcement of its criminal laws "must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment." *McCoy* v. *Court of Appeals of Wisconsin*, 486 U.S. 429, 437, 108 S.Ct. 1895, 1900 (1988). The historical concept of *stare decisis* has its roots in not only the common law of England but in Roman law as well.

In *Lyons* v. *Oklahoma*, 322 U.S. 596, 605, 64 S.Ct. 1208, 1213 (1944), the Court stated the standard mandated by the federal constitution when it held that:

> The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice and in a way that necessarily prevents a fair trial. (Citations omitted.)

These guarantees are not merely limited to the trial of an accused but permeate the entire fabric of American jurisprudence. By logic and caselaw the Fourteenth Amendment applies to any appellate system that a state may decide to put in place. *See Griffin* v. *Illinois*, 351 U.S. 12, 38, 76 S.Ct. 585, 599 (1956) (Harlan, J., dissenting, "the fact that appeals are not constitutionally required does not mean that a state is free of constitutional restrains in establishing the terms upon which appeals will be allowed.") *see also*, *Id.* at 17, 76 S.Ct. at 590 (plurality opinion stating that "[b]oth equal protection and due process emphasize the central aim of our entire judicial system — all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice *in every American court*.") (Citations omitted; emphasis added.)

DUE PROCESS ANALYSIS

As noted, whether a principle of law is mandated by due process depends, in part, on how deeply that principle is imbedded into Anglo-American jurisprudence. The doctrine taken from the old Latin phrase *stare decisis et non quieta movere* and is directly translated as to adhere to precedents and not to unsettle things which are established. Black's Law Dictionary (5th ed. 1979) p.1261. Thus, it cannot be seriously disputed that the doctrine of *stare decisis* is deeply rooted in modern American jurisprudence and requires courts to treat cases with similar facts so that they will receive similar treatment. *Flowers* v. *United States*, 764 F.2d 759 (11th Cir. 1985).

English law recognizes the doctrine of *stare decisis;* it is:

> A solemn decision upon a point of law arising in any given case, [which] becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law

> was misunderstood or misapplied in that particular case. Kent, *Commentaries*, (1896 12th ed.) p.475.

In fact, the doctrine of *stare decisis* not only takes its name from the old Latin but was an accepted practice in Roman law. Blackstone's Commentaries reveal that when a question arose concerning the construction of Roman laws the practice was to state the case to the emperor in writing. 1 W. Blackstone, *Commentaries* *59. The answers of the emperor were called rescripts, and in succeeding cases had the force of perpetual law. *Id.*

In the United States the doctrine of *stare decisis* was recognized by the United States Supreme Court well over a century ago. In *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), Chief Justice John Marshall stated that:

> It is a maxim, not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. (Emphasis added.)

The plain language of Chief Justice Marshall was ignored by the Texas Court of Appeals in this case. In this case, the Texas appellate courts improperly relied upon the *Malone* case and thereby summarily rejected Petitioner's claims. This effectively denied Petitioner any meaningful review of his arguments. *See Ake* v. *Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), and *Evitts* v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). This repeated refusal to address the sole issue that

Petitioner has repeatedly asserted mandates a reversal of these convictions.

Justice Cardozo also recognized the fundamental importance of *stare decisis* to our system of jurisprudence when he wrote that:

> [I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis is at least the everday working rule of our law.* Cardozo, *The Nature of the Judicial Process* (1921) p.20 (emphasis added).

The doctrine of *stare decisis* serves important societal interests. Aside from the obvious and substantial role of *stare decisis* in the orderly adjudication of both civil and criminal cases, it is designed to ensure "evenhanded, consistent, and predictable application of legal rules." *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 271, 100 S.Ct. 2647, 2656 (1980) (plurality opinion). Furthermore, *stare decisis* provides a:

> [C]lear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [provides] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. *Moragne* v. *States Marines Lines, Inc.*, 398 U.S. 375, 404, 90 S.Ct. 1772, 1789 (1970).

Due process requires that state action must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions. *Buchalter* v. *New York*, 319 U.S. 427, 63 S.Ct. 1129 (1943). There is no

question that the doctrine of *stare decisis* is of such importance and so basic to any concept of American jurisprudence that a misapplication of the doctrine deprives an affected individual of "due process of law."

EQUAL PROTECTION ANALYSIS

The concept of equal protection of the law contained in the Fifth and the Fourteenth Amendment to the United States Constitution "has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds* v. *Sims*, 377 US. 533, 565, 84 S.Ct. 1362, 1383 (1964). By necessity, the argument under the equal protection clause will be similar in many respects to that under the due process clause, because both concepts have their genesis in "our American ideal of fairness." *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954). While due process and equal protection are not completely interchangeable neither are they mutually exlusive. *Id.*

Texas has a long history of accepting the doctrine of *stare decisis*, which has been defined as a "deliberate or solemn decision of a court made after argument on a question of law, fairly arising in a case, and necessary to its determination." *State* v. *Valmont Plantations*, 346 S.W.2d 853, 879 (Tex.Civ. App. 1961), aff'd 355 S.W.2d 502 (Tex. 1962) (citations omitted.) The *Valmont Plantations* Court specifically held that *stare decisis* does not arise in an "opinion of the judge which does not embody the resolution of a determination of the court . . . ." *Id.* Finally, the Court quoted the language of Chief Justice John Marshall noted *supra* and held that if a court's opinion goes "beyond the case, [it] may be respected, but ought not control the judgment in a subsequent suit when the very judgment is presented for decision." *Id.* at 879 (citations omitted).

An example of how the Texas courts usually apply the doctrine of *stare decisis* is *Langford* v. *State*, 578 S.W.2d 737

(Tex.Crim.App. 1979) (en banc). In *Langford*, the Court of Criminal Appeals (the court of last resort in Texas for all criminal cases) held that it was not proper to apply the doctrine of *stare decisis* to a case where a three-member panel each disagreed upon the grounds for the decision. The "decision" in *Langford* is remarkably similar to the decision in *Malone*, which the Texas court relied on to deny Petitioner any meaningful appeal.

In *Langford*, the Court of Criminal Appeals held it was not bound in any way by the panel's earlier decision where one judge found entrapment as a matter of law, one judge specially concurred in the result and the final judge dissented. *Langford*, 578 S.W.2d 737. In *Malone*, one judge found error in the jury instructions, one judge found the statute unconstitutional, and one judge dissented. *Malone*, 339 S.W.2d at 669.

Thus, there is simply no question that Texas recognizes the doctrine of *stare decisis* in its jurisprudence. Petitioner concedes and recognizes the proper application of the doctrine by the Texas courts in many instances to resolve disputed cases. Here, Petitioner is entitled to the same even-handed, proper application of *stare decisis*. Even when the error had been repeatedly brought to the attention of the Texas courts, no meaningful appeal was ever permitted Petitioner, while others have had their cases properly decided by a proper application of the doctrine. For whatever reason, Texas discriminated against Petitioner by denying it a right of appeal just as surely as if it had locked the courthouse door.

This situation, where a state prevents appellate review of a defendant's claims, has been held to violate the equal protection clause of the Fourteenth Amendment. *See Dowd* v. *United States, ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262 (1951). A state cannot arbitrarily deny the right of appeal, once it has made it available in the generality of cases. *Huffman* v. *Beto*, 382 F.2d 777 (5th Cir. 1967), cert. denied, 401 U.S. 946, 91 S.Ct. 964 (1971). Therefore, to the extent that a

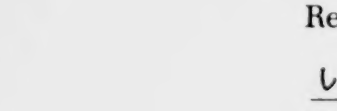
state provides a right of appeal in criminal cases, the equal protection clause requires that all affected defendants be treated alike. *Riner* v. *Raines*, 274 Ind. 113, 409 N.E.2d 575 (1980).

Petitioner has been arbitrarily singled out by an improper use of the doctrine of *stare decisis*. Texas recognizes and has fomulated the doctrine properly; nevertheless Texas failed to apply the doctrine in this case notwithstanding that this plain and obvious error has been pointed out on multiple occasions. Texas has arbitrarily and invidiously discriminated against Petitioner, in direct contradiction to the guarantees of the equal protection clause of the Fifth and the Fourteenth Amendment. *See United States* v. *Smith*, 464 F.2d 194 (10th Cir. 1972), cert. denied, 409 U.S. 1066, 93 S.Ct. 566 (1972).

CONCLUSION

For all the foregoing reasons, and to ensure the concept of *stare decisis* in the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, and to ensure all people equal protection of the law when a state grants a right to appellate review, Petitioner Video News, Inc. requests this Court issue a Writ of Certiorari to the Court of Appeals for the First District of Texas.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition have been mailed by regular U.S. mail to John B. Holmes, District Attorney, Harris County, Texas, 201 Fanin Street, Houston, Texas 77002, on this 10 day of July, 1990.

EDMUND J. McKENNA

APPENDIX

OPINION

IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01-89-00465-CR
NO. 01-89-00593-CR
NO. 01-89-00594-CR
NO. 01-89-00595-CR
NO. 01-89-00596-CR
NO. 01-89-00597-CR
NO. 01-89-00598-CR
NO. 01-89-00599-CR
NO. 01-89-00600-CR
NO. 01-89-00601-CR
NO. 01-89-00602-CR

VIDEO NEWS, INC., Appellant
v.
STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause Nos. 8814935, 8827331, 8827475, 8827476, 8827655, 8827656, 8828131, 8828138, 8828139, 8828140, 8828141

In response to a plea of nolo contendere, appellant was found guilty of possession of obscene material in violation of

Texas Penal Code section 43.23. The court imposed a fine of $1,000 on appellant.

On May 1, 1989, appellant argued its motion to quash the information, alleging, among other things, that sections 43.21, et seq. of the Texas Penal Code are unconstitutional on their face in that they are overbroad in light of Article I, section 8 of the Texas Constitution. Appellant is here appealing the trial court's denial of its motion to quash, and in its single point of error presents the same issue for determination by this Court.

Article 1, section 8 of the Texas Constitution provides in pertinent part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .

Appellant notes that the first amendment to the U. S. Constitution contains a negative prohibition against the Congress passing any laws to abridge the freedom of speech or press. Appellant also notes that the U.S. Supreme Court has found that "obscenity" is not "speech" and therefore, not subject to the protection of the first amendment. *Miller* v. *California*, 413 U.S. 15 (1973). However, appellant argues that in the Texas constitutional provision, the use of the language "on any subject," means that it should be interpreted as a grant of broader protection to include even obscenity. Appellant argues that obscenity deals with a "subject," that of human sexual relations, and thus, comes within the language of the Texas Constitution.

On this point, the Court's attention is directed to authority from Oregon and Tennessee. These states also have language in their constitutions saying that every person is free to speak, write, or publish "on any subject." Citation is made to cases from both those states holding their state's obscenity statutes unconstitutional on the basis of their state constitutional language. *State* v. *Henry*, 302 Or. 510, 732 P. 2d 9 (1987) and

State v. *Sanders*, No. 87-04921 (Tenn. Crim. App., Sept. 23, 1988) (unpublished).

However, we need not resort to sister state authority on how to interpret section 8, article I of the Texas Constitution as it pertains to obscenity.

Former article 527, of the Penal Code is the forerunner of today's commercial obscenity statute, which appellant challenges. Like today's statute, it outlawed the sale of magazines having as their dominant theme, subject matter that, among other things, appeals to a prurient interest in sex. In the case of *Malone* v. *State*, 339 S.W. 2d 666 (Tex. Crim. App. 1960), as in this case, appellant challenged the commercial obscenity statute on the ground that it was overbroad under Article I, section 8 of the Texas Constitution. The court held that the Texas Constitution did not extend freedom of the press protection to a person who, for the purpose of a sale, knowingly possessed "any magazine containing material which is denounced by penal statute and condemned when measured by application of the following test: 'Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' " *Id.* at p. 667. Section 43.23 of the Texas Penal Code is such a statute denouncing the possession of such material for sale and utilizing the prurient interest test. Thus, in accordance with *Malone* v. *State*, we hold that the statute is constitutional under Article I, section 8 of the Texas Constitution.

The judgment is affirmed.

s/s D. Camille Dunn
D. Camille Dunn
Justice

Justices Bass and O'Connor also sitting.

Publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered November 16, 1989
True copy attest:
/s/ KATHRYN COX
Clerk of the Court

NOS. 1600-89 through 1610-89

VIDEO NEWS, INC., Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the First Court of Appeals [HARRIS County]

OPINION ON APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW

Appellant pled nolo contendere and was convicted by the trial court of possession of obscene material. A fine of $1,000 was assessed in each of the eleven cases. Appellant's convictions were affirmed. Video News, Inc. v. State, 781 S.W.2d 411 (Tex.App. — Houstion [1st], 1989).

Appellant raises one ground for review. We agree with the Court of Appeals that this ground does not mandate reversal. However, as is true in every case where discretionary review is refused, this refusal does not constitute endorsement or adoption of the reasoning or language employed by the Court of Appeals. Sheffield v. State, 650 S.W.2d 813 (Tex.Cr.App. 1983).

With this understanding, we refuse appellant's petition for discretionary review.

PER CURIAM

DELIVERED March 5, 1990
PUBLISH
Clinton, J., would grant

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case Nos. 1601-89, 1602-89, 1603-89, 1604-89, 1606-89, 1607-89, 1608-89, 1609-89

STYLE: Video News, Inc.

February 28, 1990
COA #: 01-89-00593-CR, COA #: 01-89-00594-CR,
COA #: 01-89-00595-CR, COA #: 01-89-00596-CR,
COA #: 01-89-00598-CR, COA #: 01-89-00599-CR,
COA #: 01-89-00600-CR, COA #: 01-89-00601-CR

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

JUDGE CLINTON WOULD GRANT.

Thomas Lowe, Clerk

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case Nos. 1600-89, 1601-89, 1602-89, 1603-89, 1604-89, 1605-89, 1606-89, 1607-89, 1608-89, 1609-89, 1610-89

STYLE: Video News, Inc.

April 11, 1990
COA #: 01-89-00465-CR, COA #: 01-89-00593-CR,
COA #: 01-89-00594-CR, COA #: 01-89-00595-CR,
COA #: 01-89-00596-CR, COA #: 01-89-00597-CR,
COA #: 01-89-00598-CR, COA #: 01-89-00599-CR,
COA #: 01-89-00600-CR, COA #: 01-89-00601-CR,
COA #: 01-89-00602-CR

On this day, the Appellant's Motion for Rehearing was denied.

JUDGE CLINTON WOULD GRANT.

Thomas Lowe, Clerk

CASE NOS. 1600-89, 1601-89, 1602-89, 1603-89, 1604-89
1605-89, 1606-89, 1607-89, 1608-89, 1609-89, 1610-89

IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

VIDEO NEWS, INC.,
Defendant-Appellant,
vs.
THE STATE OF TEXAS,
Plaintiff-Appellee.

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON

CAUSE NOS. 01-89-00465-CR, 01-89-00593-CR,
01-89-00594-CR, 01-89-00595-CR, 01-89-00596-CR,
01-89-00597-CR, 01-89-00598-CR, 01-89-00599-CR,
01-89-00600-CR, 01-89-00601-CR, 01-89-00602-CR

MOTION FOR REHEARING

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IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

VIDEO NEWS, INC.,
Defendant-Appellant,
vs.
THE STATE OF TEXAS,
Plaintiff-Appellee.

MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS:

Comes now Defendant-Appellant Video News, Inc., by and through counsel, and petitions this Court pursuant to Rule 230 of the Texas Rules of Appellate Procedure to reconsider its decision not to grant discretionary review in the within case.

GROUNDS FOR REHEARING

The constitutional issue presented in this case is of substantial importance in the State of Texas because it raises fundamental questions regarding the scope and protection provided by Article 1, Section 8 of the Texas Constitution dealing with freedom of speech which defendant-appellant contends provides a broader protection than the First Amendment to the United States Constitution. The Court of Appeals effectively refused to address this argument raised by defendant-appellant by its misapplication of *Malone* v. *State*, 339 S.W.2d 666 (Tex.Crim.App. 1960). Refusal of review in this case would do more than wrong the defendant-appellant; refusal would allow a substantively incorrect methodology of *stare decisis* to stand as proper precedent and permit the continued emasculation of the protection provided by the Texas

Constitution. Finally, this Court has not addressed the *Miller-Roth* obscenity test as currently applied by the United States Supreme Court to the special requirements of the Texas Constitution. The vagueness and overbreadth arguments that were not considered by the Court of Appeals have never been authoritatively decided by this Court. Therefore, this Court should reconsider its decision to refuse review of this case.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 1, 1989, in the Criminal Court No. 6 of Harris County, Texas, before the Honorable J. R. Musselwhite, Defendant-Appellant Video News, Inc. pled *nolo contendere* and was found guilty of possession of obscene material in violation of Texas Penal Code section 43.23. The court found defendant-appellant guilty and imposed a fine of one thousand dollars ($1,000.00). A timely appeal was perfected to the Court of Appeals for the First Supreme Judicial District of Texas at Houston. The Court of Appeals affirmed defendant-appellant's conviction in an opinion filed November 16, 1989. No rehearing before the Court of Appeals was sought.

Prior to entering a plea of *nolo contendere*, Defendant-Appellant Video News, Inc. on May 1, 1989, argued a motion to quash the information, specifically contending that sections 43.21 *et seq.* of the Texas Penal Code are unconstitutional under the Texas Constitution, even though those statutes may be constitutional under the United States Constitution. A petition for a discretionary review was timely filed with the Clerk of the Court of Appeals, and this Court refused review of this case on February 28, 1990, with Judge Clinton voting to grant review.

ARGUMENT

THE COURT OF APPEALS ERRED IN RELYING ON *MALONE V. STATE,* 339 S.W.2d 666 (TEX.CRIM. APP. 1960), IN HOLDING THAT THIS COURT HAS AUTHORITATIVELY RULED ON THE CONSTITUTIONALITY OF TEXAS PENAL CODE SECTIONS 43.23 *ET SEQ.,* THE TEXAS OBSCENITY STATUTE.

In its opinion, the Court of Appeals expressly declined to review petitioner's claim that the Texas obscenity law is overbroad under the Texas Constitution. Rather, the Court of Appeals relied on a decision of this Court, *Malone* v. *State*, 339 S.W.2d 666 (Tex. Crim. App. 1960), holding that *Malone* was authority that *any* obscenity law, such as Texas Penal Code sections 43.23 *et seq.* is constitutional under the Constitution of the State of Texas. However, *Malone* simply cannot be read to stand for any such proposition.

The "decision" by the *Malone* Court was rendered by a divided panel of this Court. In *Malone*, the defendant was convicted of possession of obscene magazines and fined three hundred dollars ($300.00). On appeal, the conviction was reversed and remanded. A majority of the panel thus concluded that the conviction could not stand; however, the judges completely disagreed on the grounds necessitating the reversal.

Presiding Judge Morrison opined that the conviction was invalid because proper instructions which had been requested by the defendant had been improperly denied by the trial court, and prejudice resulted. *Id.* at 668. In what can only be described as *obiter dictum*, Judge Morrison did state that a statute which embodied the definition of obscenity as contained in *Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957), would comport with the Texas Constitution, although he offered no analysis to bolster this conclusion.[1]

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[1] Subsequent to the *Malone* decision, the United States Supreme Court significantly altered the test for obscenity in *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), by changing the third-prong of the test to whether

Judge Davidson authored a concurrence, specifically "concur[ring] in the reversal of this conviction" because "the evidence is insufficient to support the conviction." *Malone*, *supra* at 668-69. Further, Judge Davidson specifically stated that the "*statute under which this prosecution is brought is unconstitutional* and invalid for the reason that it is so indefinitely framed and of such doubtful construction that it cannot be understood from the language in which it is expressed and is therefor insufficient as a penal statute." *Id.* at 669 (emphasis added).

Finally, Judge Woodley dissented, and would have held that any error was harmless. Therefore, Judge Woodley would have affirmed the result of the trial. Nowhere in his dissent did Judge Woodley discuss the constitutionality of the statute under the Texas Constitution or in any other manner.

The error of the Court of Appeals is manifest and seems to need no extensive citation of law. Because of the manner in which *Malone* was decided, that case cannot be cited for the proposition of law that the current version of the Texas obscenity law is constitutional under the Texas Constitution, any more than it can be cited for the proposition of law that the current law is unconstitutional. Accordingly, the Court of Appeals clearly erred when it relied on *Malone* to overrule defendant-appellant's point of error.

This Court confronted a very similar situation in *Langford* v. *State*, 578 S.W.2d 737 (Tex. Crim. App. 1979) (en banc). In *Langford*, it was held that the Court of Criminal Appeals was not bound by an earlier decision of a panel where one (1) judge found entrapment as a matter of law, one (1) concurred in the result and one (1) judge dissented. There, as here, no precedential value should be given to a decision that is not concurred in by at least a majority of the panel.

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the material taken as a whole lacks serious literary, artistic, political or scientific value. Prior to *Miller* (and under *Roth*), the challenged material had to be "utterly without redeeming social value." *See Miller*, *supra* at 24, 93 S.Ct. at 2615. Thus, the issue before the Court of Appeals, whether the *Miller* defintion of obscenity comports with the Texas Constitution, was never addressed by the *Malone* Court in any manner.

The history of Texas jurisprudence has long accepted the doctrine of *stare decisis* as a "deliberate or solemn decision of a court made after argument on a question of law, fairly arising in a case, *and necessary to its determination.*" *State* v. *Valmont Plantations*, 346 S.W.2d 853, 879 (Tex. Civ. App. 1961), aff'd, 355 S.W. 2d 502 (Tex. 1962) (citations ommitted; emphasis added). The Court specifically held that *stare decisis* does not arise where the "opinion of the judge which does not embody the resolution of a determination of the court. . . ." *Id.* Finally, the Court quoted Chief Justice Marshall by holding that if courts in their opinions "go beyond the case, they may be respected, but ought not control the judgment in a subsequent suit when the very argument is presented for decision." *Id.* at 879.

In this case the Court of Appeals' errors were numerous: (1) The Court applied an opinion of a single judge and gave that opinion full precedential value under the doctrine of *stare decisis*; (2) the Court applied a case as controlling precedent which addressed a substantially different issue (due to the critical distinction between the definitions of obscenity contained in *Roth*, *supra*, and *Miller*, *supra*); and (3) finally, the Court gave full precedential value to an aspect of a single judge's opinion of an issue that was unnecessary to that decision.

The general rule is that only a judicial opinion that is supported by a majority of a court is considered as precedent and can have *stare decisis* effect. *See Alaska* v. *Troy*, 258 U.S. 101, 42 S.Ct. 241 (1922); 20 American Jurisprudence 2d *Courts* §§ 189, 190 (1965). *Stare decisis* is a deliberate or solemn decision of a court fairly arising in a case and *necessary to its determination*. *State* v. *Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App. 1961), aff'd, 355 S.W.2d 502 (Tex. 1962).

It can hardly be disputed that the constitutional decision of Judge Morrison in *Malone* was unnecessary to its disposition because the case was reversed and remanded in any event. The longstanding rule is that Texas courts will not rule on constitutional questions where such rulings are unnecessary.

Cravens v. *State*, 122 S.W.2d 29 (Tex. Crim. App. 1938). Further, needless consideration of attacks on the constitutionality of statutes are to be avoided. *Ex parte Sepulveda*, 2 S.W.2d 445 (Tex. Crim. App. 1928).

PRAYER

For all the foregoing reasons and authorities, Defendant-Appellant Video News, Inc. prays that this Honorable Court reconsider its decision to refuse review and grant the petition for discretionary review to consider the fundamental and substantial questions involved in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing was mailed, by ordinary U.S. Mail, to John B. Holmes, District Attorney, Harris County, Texas, 201 Fanin Street, Houston, Texas 77002, Attorney for Plaintiff-Appellee, and to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711, this 8th day of March, 1990

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